State of Rajasthan vs. Prem Singh
(S.B.Criminal Appeal No.188/88)

Date of Judgment:- 11th May, 2006.

HON'BLE MR.JUSTICE R.C.GANDHI

Mr.O.P.Rathi, Public Prosecutor for the State.
Mr.Manish Shishodia, for the respondent.

(ORAL)

This Criminal Leave to Appeal u/s 378(i) & (iii) Cr.P.C. has been directed against the judgment dated 7.12.1987 passed by the learned Munsif and Judicial Magistrate First Class, Kumbhalgarh in Criminal Case No.100/82 whereby he has acquitted the accused for the alleged commission of offence u/s 4/9 of the Opium Act (for short "the Act" hereinafter).

The prosecution story in brief is that on 27th May, 1982 Devilal, Sub-Inpector, Narcotics Bureau, Chittorgarh inspected the Bus No.RRM 9568 and having developed suspicion in his mind, inquired the name of the accused who told his name Prem Singh. A bag was lying near his feet. It was taken in possession and upon search, two packets containing opium were found and on being weighed it was found 2.600 kgs. On spot, the Recovery Memo was prepared. Out of these two packets, 30 gms. of opium was taken out as sample for sending to the Forensic Science Laboratory for analysis. The remaining contraband substance was sealed separately. The F.I.R. was lodged with the concerned Police Station. The other formalities were observed and the challan was presented against the appellant for alleged commission of offence u/s 4/9 of the Act. The accused pleaded not guilty to the charge and was put to trial. The prosecution led the evidence except Abhay

Singh, Conductor of the bus, who has been cited as eye-witness. On appreciation of the evidence led by the prosecution, the trial Court has come to the conclusion that the prosecution has failed to prove the Recovery Memo against the accused and acquitted the accused-respondent.

The appellant has challenged the judgment under appeal on the ground that the trial Court has not legally appreciated the prosecution evidence and the prosecution has discharged its onus of proving the recovery memo. Further, the contraband substance recovered from the possession of the accused has also been sent to the F.S.L. which has reported that the contraband substance is opium having 5.24% morphine. The finding of the trial Court according to the prosecution are erroneous and deserve to be set aside.

Heard learned counsel for the parties and perused the record.

On perusal of the record, it is seen that Devilal, Sub-Inspector of the Narcotics Bureau inspected the bus on 27.5.1982. On being suspicious, he asked the accused to come down from the bus and also took the bag in possession lying in his legs. On search of the bag, it was found containing two packets of opium and on being weighed was found 2.600 kgs. The sample sent to the F.S.L. for analysis has been proved to be of opium.

On appreciation of the statements of the parties, it is seen that the prosecution has produced two motbirs/eye-witnesses i.e. P.W. 2 Mohd. Hasan, driver of the Bus and conductor Abhay Singh in the Court. P.W. 2 Mohd. Hasan has not supported the prosecution story and has gone to the extent of stating that he does not know as to whether the bag was taken in possession from the bus or from the accused.

Abhay Singh has not been produced before the Court.

PW. 1 Devilal has stated in his statement that he cannot say definitely as to whether the recovered bag was of the accused or of any other person though, the prosecution has projected that the bag containing contraband substance was lying in between the feet of the accused.

P.W. 6 Durgalal has stated in his statement that he is not sure as to whether the bag was lying in between the feet of the accused. He has also stated that recording of his statement u/s 161 Cr.P.C. to the extent that he saw the bag kept in between the feet of the accused is not correct.

P.W. 5 Narendra Kumar has stated in his statement that he has not entered in the bus at the time of the recovery and was standing outside the bus. He has not supported his statement recorded u/s 161 Cr.P.C. Similarly, P.W. 9 Suresh Kumar has stated that he also did not enter in the bus and was standing outside about 2-3 feets away from the bus. The prosecution under such circumstances has not been able to prove the recovery and the story as projected. To record conviction, the case should be proved beyond reasonable doubt. If the recovery memo is not proved, it is fatal to the prosecution case as the accused cannot be connected with the substance and the most significant evidence in such cases is the recovery from the possession of the accused which the prosecution has failed to make out . It has been held by a Coordinate Bench of this Court in case title **"Deva vs. State of Rajasthan"**, reported in 1991 WLN(UC), 229 relying upon the judgment of the Supreme Court in **State vs. Daulatram (AIR 1980 S.C. 1314)** that where recovery is not proved, the conviction cannot be recorded and observed as under :-

> “In the present case, two motbirs of the alleged recovery namely; Shambhulal and Dayaram, Shambhulal has turned hostile while Dayaram was not examined. In Kasim Ali's case(supra), the view has been taken that motbir witnesses have turned hostile therefore, the recovery cannot be held to be proved by the prosecution solely on the testimony of Investigating Officer, the conviction is liable to be set aside.
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> Considering the view taken by their Lordships of the Supreme Court in Daulatram's case (supra) and the view taken by this Court in respect of the recovery, where the motbirs have turned hostile. In such circumstances, the conviction is not justified.”

For the aforesaid reasons, the prosecution has not been able to convince the Court to take a different view to that what is taken by the trial Court. I do not find any reason to interfere with the judgment of the trial Court. The appeal being devoid of merit is dismissed.

(R.C.GANDHI),J.